Supreme Court, U.S.
FILED

No. 10-805

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In the
Supreme Court of the United States

TU MY TONG,

Petitioner,

v.

MICHEL RONE, US CREDIT BANCORP, INC., et al.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is it a violation of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution for a court to permit a lender to add attorneys' fees incurred purportedly in defense of its security to a Note, which fees would not have been incurred at all but for the lender's willful and wrongful refusal (as determined by a jury) to allow the Note to be paid off?

Is it a violation of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution for a court to deny an award of attorneys' fees to a plaintiff who has obtained a damage award against a lender for willful and wrongful refusal to allow her to pay off a Note?

Is it a violation of due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution for a court to refuse to allow a jury to consider emotional distress damages of a plaintiff who has been wrongfully and willfully precluded from paying off a Note on her property resulting in threatened foreclosure and over $190,000 in damages?

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PARTIES AND CORPORATE DISCLOSURE

The parties to this action are Tu My Tong, an individual, and US Credit Bancorp, Inc. To Petitioner's knowledge, there is no parent or publically held company owning 10% or more of the corporation's stock.

JURISDICTIONAL GROUNDS FOR PETITION

This Petition for Writ of Certiorari seeks review of a denial of review by the Supreme Court of the State of California on September 15, 2010. (Appendix p. 34) following an unpublished decision of the Court of Appeal of the State of California filed June 29, 2010. (Appendix pp. 1 through 31)

This Petition is proper and timely and within the jurisdiction of this Court pursuant to the United States Constitution, Article III, Section 2, Clause 1 and Rules of the Supreme Court of the United States, Rule 13.1 and 28 U.S.C. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendment V provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ." The United States Constitution, Amendment XIV provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

INTRODUCTION

This case presents an egregious example of predatory loan practices. The evidence showed that defendant purchased a Note secured by property owned by plaintiff. Soon after the purchase, defendant made a series of "offers," all detrimental to the plaintiff, by which the defendant attempted to increase the interest rate, extract a huge surcharge, or further encumber the property. When plaintiff tried to make payments on the Note, defendant refused to accept them. When plaintiff wanted to pay off the Note, defendant refused to provide a payoff statement on the newly-contrived pretext that plaintiff was not "entitled" to do so. Over the course of several years, defendant continued to inflate the amount due on the Note. In short, the defendant engaged in a course of conduct intentionally designed to make it impossible for plaintiff to pay off the Note so that the defendant could eventually foreclose on the Property.

At trial, the jury determined that the defendant had wrongfully and willfully violated California Civil Code section 2943 when it failed to provide plaintiff with a payoff demand following her request for one on January 18, 2005, and that its failure to do so resulted in damage to plaintiff in excess of $190,000.

However, following the verdict, a bench trial commenced on the bifurcated declaratory relief action in which the court was to determine the final amount due on the Note. Notwithstanding the jury's finding that the defendant had engaged in willful, wrongful conduct to plaintiff's great damage, the court increased the balance due on the Note by adding on substantial attorney's fees incurred by the defendant in connection two third-party actions tangentially related to the Property, despite the fact that the defendant would not have been a party to these third party actions at all if it had allowed plaintiff to pay off the Note in the first place. The court further erred in refusing to award plaintiff her attorney's fees in the instant action.

The appellate court found no error, other than in the form of the judgment.

STATEMENT OF THE CASE

Statement of Facts

1. Note and Deed of Trust

Duc Doan (Doan) owned an apartment building located on the 4000 block of South Figueroa Street in Los Angeles (the property). In August 2000, Doan entered into an adjustable rate note for $312,000 with Southern Pacific Bank that eventually was assigned to Imperial Credit Industries, Inc. (Imperial). As security for the loan, a multifamily deed of trust for the property was recorded with the county recorder's office in September 2000. A number of outstanding payments accrued under the note, and Doan defaulted on his loan.

Between February and April 2003, Doan transfered all of his interest in the property to appellant Tong through a series of deeds.

2. ***Attempted Assumption by Tong***

Although the Note gave Doan the right to transfer the Property to plaintiff, that right was subject to the lender's consent. After receiving the deeds from Doan, Tong attempted to assume the loan. On May 19, 2003, Imperial notified both Doan and Tong by certified mail that Doan was in default under the Note and Trustee Deed due to the transfer to plaintiff and due to the alleged poor condition of the property.[1] Imperial refused to allow Tong to assume the Note and told her she would have to pay off the entire balance of $292,083.

Because Imperial refused to allow Tong to assume the Note payments and demanded full payment, and because she would have to spend hundreds of thousands of dollars to renovate the Property in accordance with the City's demands in order to make it profitable, on May 29, 2003, Tong entered into an agreement to sell the property to

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At the time she acquired the Property, the multi-unit apartment building on the Property had been determined to be substandard and uninhabitable by the City of Los Angeles, rendering the apartment units illegal to rent until the building was brought up to Code. Although Tong knew the building was in need of repair, she did not know the City had ordered it vacated. At the time Tong took over the property, Doan was being prosecuted as a slum lord.

Urban Eco Housing, LLC (Urban Eco), for $575,000. However, the sale fell through when Urban Eco failed to timely deposit funds in escrow. Urban Eco filed a lis pendens on the Property and demanded that Tong pay them to remove it.

The loan having not been paid, Imperial recorded a notice of default and election to sell the property under the deed of trust on June 20, 2003.

3. USCB's Purchase of Note and attempts to obtain the Property

In August 2003, USCB purchased the loan from Imperial, making USCB the new lender.[2] USCB wrote Tong's attorney advising it had assumed the Imperial loan based on Tong's representation that she owned the property and that she would pay the loan in full on November 30, 2003. USCB stated the amount currently outstanding was $313,900 bearing interest at 11.86 percent and no partial payment would be accepted.

Meanwhile, on June 10, 2003, Doan filed an action against Tong in state court and recorded a lis pendens on the property to prevent foreclosure.

At the time USCB purchased the Note, Rone was aware that Tong had been sued by Doan, but there is no evidence that Rone or USCB conditioned Tong's payoff on providing evidence that she was Doan's successor in interest under Civil Code section 2943. To

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[2] USCB's principal and sole owner is Michel Rone. Rone was named as a defendant, but dismissed just prior to trial.

the contrary, commencing in August 2003, Rone/USCB engaged in a serious of correspondence with Tong and her attorneys making various "offers" regarding the property, none of which required her to obtain permission from Doan or otherwise establish her right to sell or encumber the Property. Specifically, in August 2003, Rone wrote to Tong seeking to retroactively, from August 2000, increase the interest rate on the note from 11.8% to 14.86%. On advise of counsel, Tong did not agree to this.

On November 1, 2003 Rone sent a letter threatening to sell the Note unless Tong paid off the balance due plus an extra $35,000 surcharge at an interest rate of 14.86%. On advise of counsel, Tong did not agree to this.

On November 5, 2003, Tong requested a meeting with Rone, saying she intended to pay off the loan in full by November 7, 2003. Tong had funds available to pay off the note through an oral understanding with Dennis Hawks, a private lender who was willing to lend her $340,667.39 at 6% interest. Tong never received a response to her letter.

On March 28, 2004, Rone wrote to Tong offering to have his construction company, Alfa Construction, repair and renovate the property for $250,000, with this amount to be added to the Note at a rate of 28%.

Thereafter Rone met with Tong and suggested that they become partners in the property with 51% and her with 49%. After Tong refused this offer, he threatened to foreclose on her.

On September 21, 2004, Rone wrote again, this time offering to buy the property from plaintiff for $1.142 million (all of which would be used to pay off indebtedness, leaving plaintiff with nothing) and offering her a 90-day option to repurchase the Property for a 25% mark-up, plus reimbursement of attorney' fees and other alleged expenses.

None of this correspondence ever suggested that plaintiff was not Doan's legitimate successor in interest or not entitled to pay off the Note. Instead, all of these communications assumed that Tong was entitled to pay off the Note, further encumber the Property, or even sell the Property outright.

Meanwhile, with the financial assistance of her family, Tong had been renovating the building as required by the City. In October 2004, after having spent a hundred thousand dollars to repair and renovate the building, Tong obtained a permit from the City allowing her to rent out the apartments.

At that time property values in Los Angeles were going up very quickly so the value of the property had increased dramatically.

In October 2004, after Tong obtained permits from the City of Los Angeles allowing her to rent out the apartment units, she began receiving income from the property. Rone came out and inspected the property and was satisfied with its condition and, according to Tong, agreed to accept monthly payments of $3,500. Immediately thereafter, commencing in November 2004 (and continuing through September 2007), Tong began sending the defendant monthly payments of $3500 on the Note. On November 2, 2004,

plaintiff sent her first two monthly payments, totaling $7,000, to Rone, together with a hand-written, emotional letter of gratitude to Rone for being the "humanity lender I so lucky to meet."

However, shortly thereafter, Rone, through his attorney, began returning plaintiff's monthly payments uncashed, claiming he had not agreed to accept monthly payments. (RT 9-10, 408.)[3]

4. Doan's Bankruptcy and Adversary Proceedings

In August 2003, Doan filed for bankruptcy. In June 2004, Doan filed an adversary proceeding in the bankruptcy court against Tong, USCB and Rone with respect to the property. In his complaint, Doan claimed that, in exchange for his transferring title in the property to Tong, she had promised to live with him, to obtain a loan and to help him repair the property. He alleged Tong then tried to sell the property for herself and made a deal to sell the property to Urban Eco. Doan alleged that Tong had conspired with Rone and USCB to share profits from the property, of which Doan was the legal owner. Urban Eco then intervened in the adversary proceeding and filed a cross-claim against Tong, USCB and Rone.

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Tong testified that she came to believe that Rone never wanted to accept payments because he wanted to foreclose on her so that he could buy the Property at a cheap price. He did not takes steps to foreclose right away. Rather, he waited until after she had renovated the building, its value had increased, it was generating rental income and the lis pendens had been expunged.

Urban Eco alleged it was a bona fide purchaser for value of the property and that USCB and Rone had conspired with Tong and had interfered with Urban Eco's contract to purchase the property from Tong.

In July 2004, the bankruptcy court entered an order confirming Doan's chapter 13 plan. Under the plan, Doan and the bankruptcy trustee stipulated that Doan would be allowed to pursue the quiet title adversary proceeding himself against Tong, USCB and Rone to seek recovery of the property but that Doan would be responsible for all attorney's fees and costs of the suit.

5. Tong's Requests for Payoff Demand Statement

In early November 2003, Tong, through her then attorney, submitted her first request to USCB for a payoff demand statement pursuant to section 2943. USCB produced a statement indicating the amount due on the note as of November 7, 2003, was $341,791.20 and requested payment in full.

Due to several encumbrances placed on the property, Tong was unable to obtain a lender. However, Hawk was still willing to lend Tong money to pay off the note at 6 percent interest secured by the property if all other loans were subordinated to his lien.

On January 18, 2005, Tong through her then counsel requested another payoff demand statement from USCB. USCB refused to provide the statement without sufficient proof of Tong's status as an entitled person or a beneficiary under the deed of trust. Tong did not provide the requested proof, but, on May 5,

2005, Tong's counsel responded by offering to make "full payment" of the note and deed of trust, which he currently estimated to be $413,000, within three business days of receipt of demand.

USCB wrote Tong's counsel on May 19, 2005, asserting *for the first time, and in contravention of USCB's repeated previous attempts to purchase or encumber the property without ever suggesting that she was without legal standing to accept these offers,* that Tong was not the borrower on the note and "as such she does not have the legal standing to make a payoff demand" absent proof of Tong's entitlement, such as Doan's permission, which he refused to give. At trial, however, USCB's counsel acknowledged that the Bankruptcy Court in the Duc Doan matter had issued an order months before, on July 26, 2004, stating that the Property was not an asset of the Doan bankruptcy. He also acknowledged that had the defendant accepted payment of the Note from Tong, there would have been no harm to Doan. Rone himself testified that he had always considered plaintiff to be the owner of the property.

USCB's counsel informed Tong's counsel that because Doan was then in chapter 13 bankruptcy proceedings and the source of funds for repayment might constitute post-petition financing or an action outside the ordinary course of business, "before payment will be accepted by my client and credited to its account I request an order of the Bankruptcy Court approving the post-petition payment."

On November 21, 2006, the bankruptcy court entered a final judgment in the adversary proceeding in favor of Tong and against Doan, declaring Tong to be the owner of the property. Tong's counsel provided USCB with a copy of the bankruptcy court judgment on the same day.

USCB then provided Tong with a payoff demand statement on November 30, 2006. The statement reflected that $688,593.06 was owed on the note at that time. This amount included $153,559.44 in attorney fees incurred to protect the integrity of the note from August 12, 2003, to November 30, 2006.

Procedural History

1. First Amended Complaint

Tong filed the present action against USCB and Rone on August 24, 2006. In February 2007, USCB gave notice of default of its note. Thereafter Tong filed a first amended complaint in which she alleged, among other things, that USCB failed to timely respond to her January 2005 payoff statement demand. Among other causes of action she asserted claims for violation of section 2943, declaratory relief and equitable relief. Simultaneously with the filing of the first amended complaint, Tong sought and received, after posting a substantial bond, a preliminary injunction restraining USCB from foreclosing on the deed of trust executed by Doan.

Tong alleged that USCB and Rone refused to allow her to pay off the loan and prevented her from obtaining new, lower rate financing. Tong claimed the failure to provide the requested payoff demand

statement for over two years was intended to eventually create such a financial burden on the property that Tong would not be able to pay off the loan allowing USCB and Rone to acquire the property by foreclosure and that the failure to provide the payoff caused her damages, including approximately $300,000 in late fees, interest, attorney fees charged on the loan, attorney fees incurred by Tong to protect the property and other general and special damages.

2. Judgment on Pleadings

Shortly before trial, USCB and Rone moved for judgment on the pleadings, and the court granted the motion as to Rone alone. The court determined Rone personally was not a beneficiary of the deed of trust nor an assignee of a beneficiary subject to section 2943, subdivision (c) and therefore had no obligation to comply with section 2943.

3. Bifurcated Trial

The case proceeded to a bifurcated trial.

A. Jury Trial, Nonsuit and Special Verdict

The claims for violation of section 2943 was tried to a jury. The jury found by special verdict that Tong was an "entitled person" within the meaning of section 2943. It found that Tong made a written demand to USCB for a payoff demand statement on January 18, 2005, and that USCB willfully failed to provide her with a statement within 21 days of the demand as required. The jury determined Tong sustained actual damages of $190,473.66 as a result of that failure.

In a supplemental special verdict, the jury answered "no" to the question whether any portion of the damages it awarded was based on the attorney fees

USCB requested in the payoff statement.

B. Court Trial

The trial court then proceeded to hear and determine the remaining equitable issues. The court limited its inquiry to determining (1) the rights and obligations of the parties under the note, i.e., "what the loan amount is," and (2) whether any claimed attorney fees incurred in defending the note is chargeable to the note.

On May 27, 2008, the court made a tentative ruling. The court found as of April 1, 2008, the amount due on the note as claimed by USCB was $756,473.96. The court subtracted from this figure the jury's damage award of approximately $190,000 and added an amount for reasonable attorney fees USCB incurred in defending the security in Doan's bankruptcy and the adversary proceedings.

The court entered a judgment on August 1, 2008.

C. Judgment

The judgment as entered declared that Tong owed USCB the sum of $522,546.85 on the adjustable rate note as of April 1, 2008. The trial court also declared that (1) the amount owed on the note as of August 1, 2008, was $533,266.53, and (2) USCB has the right to not accept partial payments from Tong and to demand full payment on the note.

4. Motion for Attorney Fees and for New Trial

Following the judgment, Tong moved for an award of attorney fees, contending she was the prevailing party in the lawsuit. Tong also moved for a new trial, on grounds that the award to USCB of attorney fees incurred in defending the Doan bankruptcy and the Urban Eco action was against the law and without legal justification. The court denied both motions.

With respect to the motion for a new trial, the court found that Tong had misconstrued the nature of USCB's claim for attorney fees in her declaratory relief claim. USCB's claim concerned whether the attorney fees it incurred in defending the bankruptcy proceedings and the Doan and Urban Eco actions could be added to the indebtedness on the note.

With respect to Tong's motion for attorney fees, the court found Tong failed to establish she was a prevailing party on a contract pursuant to section 1717 and she had offered no basis for an award of attorney fees based on her success of her section 2943 cause of action.

5. Consolidated Appeal

Tong filed timely appeals from the judgment and from postjudgment orders. This court consolidated such appeals.

On appeal, Division Eight of California's Second Appellate District found no error in the jury verdict or the court's findings and determination for declaratory relief except as to the form of the judgment. The appellate court found that the judgment incorrectly stated that Tong, individually, "owed" $522,546.85 on the Note as of April 1, 2008. This was incorrect because Tong had no contractual or equitable relationship with USCB and therefore she has no personal liability under the note and deed of Trust. Accordingly, the court reversed and remanded for the limited purpose of permitting the trial court to revise the judgment to set forth the damages awarded to Tong independently from the amounts due and payable under the note and deed of trust.

The court held that the parties are to bear their own costs on appeal.

Petitions for Rehearing, Reconsideration and Review were denied by the Court of Appeal and the California Supreme Court.

ARGUMENT

I.

PETITIONER WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN THE COURT PERMITTED THE LENDER TO ADD ATTORNEYS' FEES TO A NOTE WHERE ITS SECURITY WAS NEVER AT RISK AND WHERE THE FEES WOULD NOT HAVE BEEN INCURRED BUT FOR THE LENDER'S WRONGFUL CONDUCT

The Due Process clause of the Fifth Amendment of the United States Constitution, which applies to the states through the Fourteenth Amendment, guarantees that no person shall be deprived of "life, liberty, or property without due process of law."

Code of Civil Procedure section 3517 provides that "[n]o one can take advantage of his own wrong." Nevertheless, although the jury found that the defendant had wrongfully and willfully violated Civil Code section 2943 and damaged plaintiff in excess of $190,000, the court permitted USCB to add to the note balance nearly $114,000 in attorneys' fees incurred in connection with the two third-party actions, fees the defendant would largely not have incurred had it allowed plaintiff to pay off the Note in early 2005 (or earlier) as it should have. The appellate court affirmed. By this ruling, the courts have deprived the plaintiff of her property without due process of law by rewarding the defendant for conduct which the jury found to be wrongful and willful misconduct.

A. **But for USCB's wrongful refusal to provide a payoff figure, it would have incurred *no fees* in the Urban Eco action and therefore USCB is precluded by law from recovering those fees**

With respect to the Urban Eco matter, the trial and appellate courts concluded that USCB "logically acted to protect its collateral" in opposing Urban Eco's claim, because Urban Eco had filed a lis pendens which sought an injunction precluding USCB from foreclosing on the property. (Appendix, p. 24). But the analysis is fatally flawed because, **but for USCB's wrongful and illegal refusal to provide a payoff demand figure**, the Note would have been paid in full **before the Urban Eco claim was even filed**.

It is undisputed that Tong's Civil Code section 2943 statutory demand for a payoff amount was proffered to USCB on January 18, 2005. Pursuant to the statute, the defendant had 21 days, until January 31, 2005, to provide the statement. It did not, and this failure was the basis for the jury's finding that the defendant had violated the statute and had caused Tong damages in excess of $190,000. It is further undisputed, that as of January 2005, plaintiff had liquid funds well in excess of the amount due on the Note, available to pay off the Note, and these funds were to be loaned at the rate of 6% (as opposed to the 11.86% which was accruing under the note).

The Urban Eco third party action, for which the trial court permitted USCB to add defense fees of over $80,000, **was not even filed until March 17, 2005**, well **after** the statutory deadline to provide the payoff figure. Therefore, had USCB not wrongfully failed to provide the payoff amount, **the USCB Note would have been paid in full prior to the filing of the Urban Eco action**. USCB would have had **no interest whatsoever** in the Note, the deed of trust, or the property, it would have had no right to foreclose on the property and there would have been no reason to even name USCB as a party to the action.

The doctrine of "unclean hands" is codified in Civil Code section 3517, which provides that "[n]o one can take advantage of his own wrong." This principle was applied in Roberts v. Henderson (1932) 127 Cal App 16, under facts very similar to the facts in this case. In Roberts, the purchasers at a mortgage foreclosure sale failed to furnish the holders of the right of redemption with a proper, statutorily mandated statement of the amount required to redeem, although such holders were willing and able to redeem and had demanded such a statement. As a result of the purchasers failure to provide the statement of amount due, the court held they could not charge interest on the foreclosure sale price after the expiration of the redemption period, for to do so would be to permit them to take advantage of their own wrong.

The same principle applies here. Since the note holder, USCB, failed to provide the payoff amount after the debtor, Tong, who was willing and able to payoff

the note, demanded such a statement, USCB should be precluded from charging additional expenses to the note which would have been avoided but for its own delay in providing the payoff amount. To allow it to do so permits USCB to take advantage of its own wrong in violation of Civil Code section 3517.

Similarly, in Ross v. McDougal (1936) 12 Cal App 2d 172, defendants were vendees under a conditional sales contract who had agreed to insure the property for a given amount. The property burned before the sale was completed and vendees sought to rescind the contract based on failure of consideration, but were precluded from doing so because they had insured the building for less than the agreed amount. The court held that the loss was suffered because of defendant's own failure to meet its contractual obligation, and so defendants had to bear that loss. They could neither profit by nor take advantage of their own neglect or wrong.

The same is true here. The "losses" that USBC suffered, to wit, attorneys' fees incurred in defense of the Urban Eco action, were suffered only because of USCB's own failure to comply with its statutory obligation to provide a payoff amount. Accordingly, it should not be permitted to profit nor take advantage of its own wrong by adding those fees, together with interest, onto the balance of the note.

B. **Neither third party action affected the property with respect to the lender's security interest or rights under the note and deed of trust**

The appellate court affirmed the trial court's conclusion that USCB's appearance in both third party

actions was necessary to protect the lender's interest. (Appendix, pp. 23-24.) But with all due respect, the court has failed to recognize that, no matter what the outcome of either third party suit, the lender's rights under the note **would not have been affected at all**.

Duc Doan's adversary proceeding was, in essence, only an action to quiet title to the property. Although Doan alleged various conspiracy theories against the parties, whom he claimed had worked together to cheat him out of his property, the gravaman of his complaint was to recover title to the Property. As such, USCB's security interest in the Property was never at risk, regardless of whether the Property was determined to be owned by Duc Doan, Tu My Tong, or both of them together. Indeed, Rone himself testified that from the time he purchased the Note through 2006, (well after dismissal of the Duc Doan action), he was never concerned that his investment was at risk because he believed the Property was worth well in excess of the amount of the Note, even after the claimed payoff amount of the Note had ballooned from a little over $300,000 to nearly $800,000.[4] (RT 614-

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[4] Specifically, Rone testified that when he purchased the Note in 2003 and the principal balance was a little over $300,000 he felt there was no risk "whatsoever" because the Property was worth more than the value of the Note. Indeed, he was so unconcerned, he did not even physically inspect the Property before purchasing the Note. When he did inspect the property in October 2003, he believed the Property was worth between $750,000 and one million dollars. By August 2006, he believed the value of Property had increased to between $3 and $4 million. (RT 614-618.)

620.) Therefore, had Doan successfully regained title to the Property, the Note still would have been fully collateralized by the Property. Thus, defense of the Doan adversary proceeding did nothing to "protect the Lender's security" within the meaning of the section 12 of the deed of trust. Moreover, the stipulation entered into between Doan and the bankruptcy trustee which allowed Doan to pursue the quiet title adversary proceeding himself specifically provided that if Doan pursued the action, Doan would be responsible for all attorney's fees and costs of the suit. Therefore, to the extent that USCB was entitled to recover attorneys' fees at all, it should have sought them against Doan.

With respect to the Urban Eco attorneys' fees, which even the trial court acknowledged were even more attenuated than in the Doan matter, even if Urban Eco had prevailed, the only outcome would have been to grant Urban Eco legal title to the property, subject to the note and trust deed that was fully secured by the property.

On these facts, it is apparent that USCB did not incur attorney's fees in the third party actions in order to "enforce and protect" its security; it did so in order to tack on ever increasing attorney's fees and interest to the "payoff" amount, thus ensuring that it would be virtually impossible for Tong to pay off the Note, leading eventually to foreclosure. Given USCB's willful and wrongful refusal to allow Tong to payoff the Note, its persistent insistence that Doan, not Tong, was the only person "entitled" to pay it, the absence of any risk to USCB's security in the event Doan's quite title action succeeded and the fact that the Bankruptcy

Court had already ruled that Doan was solely responsible for any fees incurred as a result of his action, justice demands that if USCB wants to recover the fees it incurred in that action, it should Petition the bankruptcy court to recover them from Doan.

II.

PETITIONER WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT TO DUE PROCESS WHEN THE COURT DETERMINED THAT SHE WAS NOT ENTITLED TO ATTORNEYS' FEES FOLLOWING HER SUCCESSFUL ACTION FOR DAMAGES PURSUANT TO CIVIL CODE SECTION 2943

A. **Plaintiff is the prevailing party**

Code of Civil Procedure section 1032, subdivision (a)(4) defines a "prevailing party" as "the party with a net monetary recovery . . .[and] a defendant in whose favor a dismissal is entered."

Here, in the jury trial, plaintiff asserted that the defendant's had damaged her by refusing to provide her with a payoff statement in violation of Civil Code section 2943. The jury agreed, and awarded plaintiff damages against the defendant in excess of $190,000. Plainly then, plaintiff obtained a net monetary recovery in that portion of the trial.[5]

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There was never any dispute that there was money due on the Note. The question at issue was how much was due. Accordingly, the jury's reduction of the amount which the defendant claimed was due

As to the bench trial portion of the case, the court found that some of the defendant's attorney's fees incurred in the third party actions were chargeable to the Note. Of course, plaintiff contends this finding constitutes legal error. But, even assuming, arguendo, that those fees were properly chargeable to the Note, the amount allowed by the court , $113,726.86, is still less than the amount of damages awarded to plaintiff by the jury. Therefore, taking into account the entire trial, plaintiff clearly obtained a net monetary gain and is thus the prevailing party.

Finally, plaintiff is the prevailing party on the Cross-complaint, which defendant voluntarily dismissed during trial. (RT 2402-2403.)

Where, as here, there is a clear winner in a case, it is an abuse of discretion to refuse to find that party is the prevailing party. (Hsu v. Abbara (1995) 9 Cal.4th 863, 877.)

B. **Attorney's fees to the prevailing party are authorized by statute in this case**

Code of Civil Procedure section 2943, subdivision (c)(4) provides that where a beneficiary willfully fails to provide a payoff demand statement, it is liable to the entitled persons for "***all damages***" sustained by the failure to provide the statement. Tong contends that "all damages" means what it says, and includes attorneys' fees sustained as a result of the defendant's failure to provide the statement. The Court of Appeal

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by over $190,000 constitutes a very substantial monetary gain for plaintiff.

disagreed. The issue is one of first impression.

In holding that the "all damages" language in section 2943 does not include attorneys' fees, the appellate court relied on Pinter v. Ong (1989) 211 Cal.App.3d 837, 842, for the proposition that Tong's action for violation of a statutory duty sounds in tort, rather than contract, and then goes on to hold that the language of the statute upon which Tong prevailed, Civil Code section 2943, which makes a defendant liable for "all damages" sustained as a result of violation of the statute, does not contemplate an award of attorneys' fees. (Appendix, p. 28.) However, the court neglected to note that in the very case it cites, Pinter v. Ong, (a case which USCB concedes "bears a striking resemblance" to this case), the court reached the opposite conclusion, holding that nearly identical "all damages" language in the statute was broad enough to include damages for emotional distress, even though those types of damages are not specifically identified in the statute.[6] The Pinter court ***affirmed the trial court's award of emotional distress damages to plaintiff, even though the statute does not specifically mention emotional distress damages,*** finding that since the action for the statutory violation sounds in tort, ***"we apply the general rule of tort damages, namely, that all detriment proximately***

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In Pinter, the statute which plaintiff prevailed upon was Civil Code section 2941 (defendants beneficiaries had failed to execute and deliver a request for full reconveyance as required under the statute.)

caused by breach of a legal duty is compensable, including damages for emotional distress. (Id., at 841-842, citing Young v. Bank of America (1983) 141 Cal.App.3d 108, 113.)

Moreover, in reaching its conclusion, the appellate court completely disregarded two cases which found that **the nearly identical language does include attorneys fees**. In Flintkote Co. v. Presley of Northern California (1984)154 Cal.App.3d 458, the defendant prevailed in an action to foreclose on a stop notice and mechanic's lien. The applicable statutory provision, Civil Code section 3083, provides that an unsuccessful claimant under that section must pay "all costs . . . and all damages" sustained by the defendant as a result of the claim or lien. Based on this language, the appellate court held that attorneys' fees sustained by the prevailing defendant were "damages" within the contemplation of Civil Code section 3083. (Id., p. 463-464.)

Royster Construction Co. v. Urban West Communities (1995) 40 Cal.App.4th 1158, acknowledged the correctness of the Flintkote holding, explaining that the "all damages" language in the statute is an ***"expansive measure of damages"*** which does permit the recovery of attorneys' fees. (Royster, supra, 40 Cal.App.4th at 1165, fn. 7.)

The appellate court's conclusion that Tong prevailed on only the "lesser" of her two objectives ("to recover for USCB's failure to provide the payoff demand statement and to exclude all attorneys' fees from being charged to the principal" (Appendix, pp. 27-28), is factually flawed. Tong's monetary recovery for the statutory violation substantially exceeds the full amount of attorneys' fees which the defendant sought to add to the note. (Her damage award for the statutory violation exceeded $190,000 (AA 85-88); the total amount of attorneys' fees sought by USCB was just under $144,000 (RT 3035, 3038) and of that, less $114,000 was awarded. (RT 3038-3039.) So clearly Tong's goal of recovering for USCB's statutory violation was not the "lesser" of her two objectives.

Civil Code section 2493, like section 3083, includes an "expansive measure of damages" clause broad enough to encompass attorney's fees as an element of damages. Thus, such fees are authorized by statute and plaintiff is entitled to them as a matter of right. (Code of Civ. Proc. §§1032, subd. (b); 1033.5, subd. (A)(10)(B).

C. **Attorney's fees to plaintiff are authorized in this case by contract**

In this case, three different contractual attorneys' fee provisions apply:

Paragraph 12 of the Deed of Trust provides: "If Borrower fails to perform any of its obligations under the instrument . . . Lender at Lender's option may make such appearances disburse such sums . . . . to protect the Lender's interest, including . . . payment of . . . attorneys . . (b) Any amounts disbursed by Lender

under this Section 12 . . . shall be added to the indebtedness. (AA 579.)

Paragraph 43 of the Deed of Trust provides that in the event of a default, the Lender may "invoke the power of sale and any other remedies permitted by California Law" and "shall be entitled to collect all costs and expenses . . . including attorney's fees . . ." (AA 594.)

Paragraph 7 of the Note provides: "If I am in Default, the Note Holder may without any demand or notice . . . (2) Exercise any rights that we have under any Deed or Trust . . Or that otherwise give to us by law . . .(D) the Note Holder will have the right to be paid back . . all of its costs and expense . . Those expenses include . . . reasonable attorney's fees." (AA 563.)

Although these provisions purport to benefit only the Lender, by statute, they apply reciprocally to both parties. (Civil Code section 1717).

The primary purpose of section 1717 is to ensure mutuality of remedy for attorney's fee claims under contractual attorney fee provisions . (Santisas v. Goodin (1998) 17 Cal.4th 599, 610-614.) In addition,

> Its purposes require section 1717 be interpreted to further ***provide a reciprocal remedy for a nonsignatory defendant***, sued on a contract as if he were a party to it, when a plaintiff would clearly be entitled to attorney's fees should he prevail in enforcing the contractual obligation against the

defendant.

The reciprocal provision of section 1717 applies regardless of who initiates the action. (Pacific Custom Pools, Inc. v. Turner Const. Co. (2000) 79 Cal.App.4th 1254, 1268-1269.)

In this case, although neither Tong nor USCB was a party to the original Note or Trust Deed, both were successors in interest to the Note and the Trust Deed. It is undisputed that Rone always believed that Tong was the owner of the property which collateralized the Note, and he dealt with her as the owner. It is further undisputed that the defendant repeatedly sought payment of the Note from Tong in 2003 and 2004, prior to its mid-stream change of position, commencing in January 2005, when the defendant suddenly began asserting that Tong was not entitled to payoff the Note. Moreover, it is undisputed that the defendant filed and served Tong with a Notice of Default on the Property in anticipation of conducting a foreclosure sale. (RT 639-641.) Of course, if foreclosure had occurred, the defendant would have sold plaintiff's Property and claimed entitlement to full payment of the amount due under the terms of Note as well as its attorney's fees from the proceeds.

In addition, the defendant **expressly sought attorney's fees from plaintiff, pursuant to the terms of the Note, in its own Cross-complaint against her**. Indeed, the cross-complaint repeatedly asserts, in bold print, that Tong was the "undisputed titleholder" and "Entitled Person" under the Note, the "true and legal owner of the property", "successor interest in the

mortgage," and "legally obligated to make payments under the Note", that she is "in default under the Note", and that the Cross-complainant, USCB, is entitled to recover, from Tong, "reasonable attorney's fees and costs." (AA 25-29.) Accordingly, Tong's action for violation of section 2943 should be deemed to be an action "on a contract" entitling her, as prevailing party, to reimbursement of her attorneys' fees.

III.

THE PETITIONER WAS DEPRIVED OF DUE PROCESS WHEN THE COURT WRONGFULLY CONCLUDED THAT EMOTIONAL DISTRESS DAMAGES ARE NOT RECOVERABLE UNDER CIVIL CODE SECTION 2943

Tong asserted that she was entitled to recover emotional distress damages pursuant to section 2943, which provides that when a beneficiary fails to provide a beneficiary statement, it is liable to the entitled person for "all damages" sustained by reason of that refusal. The appellate court did not reach this issue because it held that Tong was precluded from, and in any event failed to present evidence sufficient to support a claim for emotional distress damages. (Appendix pp. 13-15.) The court's conclusion was based on several errors of fact and law.

A. Tong's complaint sought general damages which includes damages for emotional distress

The appellate court concluded that "Tong did not include any claim for emotional distress damages in her complaint." (Appendix, p. 13) The statement is

inaccurate. While Tong's complaint did not expressly mention emotional distress damages, it did specifically seek "general and special damages" according to proof in connection with the first cause of action for violation of section 2943 and thus fairly includes a claim for emotional distress damages.

Ironically, as the appellate court notes with apparent approval, the trial court concluded that the defendant was not given fair notice of Tong's intention to seek emotional distress damages in connection with the section 2943 claim because "the parties had primarily a contractual relationship and [the court] construed section 2943 as a 'quasi-contractual' cause of action." (Appendix, p. 13.) Again, with all due respect, this conclusion is fundamentally unfair and legally unsupportable. USCB, the trial court and this court have all taken the position that Tong's section 2943 cause of action sounds in tort. On that basis, the trial court and this court have held that she is not entitled to recover attorneys' fees pursuant to the contract or Civil Code section 1717. Yet, when it comes to emotional distress damages, which are clearly available in a tort action, the court finds the opposite: the 2943 claim is "quasi-contractual", thereby barring Tong's recovery of standard tort damages! The 2943 claim either sounds in tort, in which case, she was entitled to seek emotional distress damages, or it sounds in contract, in which case she was entitled to recover her attorneys' fees under the contracts. The claim cannot be characterized as a tort to deny one element of damages, and then as a contract to deny a different element of damages.

Further, the court's conclusion that "Tong offers no case authority for the proposition" that she is entitled to emotional distress damages for violation of section 2943 is also inaccurate. Although Tong concedes that no case to date has discussed the issue with respect to section 2943 specifically, she did present ample case authority which permits emotional distress and attorney fee damages for analogous statutory violations as to statutes with very similar, if not identical "all damage" language. (See AOB, pp. 29-33, Reply Brief, pp. 1-4, citing Flintkote Co. v. Presley of Northern California, supra, 154 Cal.App.3d 458, Royster v. Construction Co. v. Urban West Communities, supra, 40 Cal.App.4th 1158 and Pintor v. Ong, supra, 211 Cal.App.3d 837), cases which are closely analogous to this one.

B. **Tong presented sufficient evidence of emotional distress to present the issue to the jury**

The court concludes that Tong failed to present sufficient evidence of emotional distress because she presented no medical evidence of emotional distress and because she had "many serious concerns" during the time of her dispute with USCB. (Slip Opin., pp. 12-13.) But this should not have precluded the issue from going to the jury. It is well established that emotional distress damages may be inferred based on the outrageous character of the defendant's conduct and plaintiff's susceptibility to mental distress as a result of that behavior. (Agarwal v. Johnson (1979) 25 Cal.3d 932, 946; Fletcher v. Western National Life Ins. Co. (1970) 10 Cal.App.3d 376, 396.) Tong testified at

length that Mr. Rone, of USCB, was well aware of her desperate situation and that he and USCB took advantage of her plight to wrongfully prevent her from paying off the Note for several years, resulting in staggeringly increased charges, overwhelming attorneys' fees, and the constant threat of foreclosure and other ploys to obtain her property. Based on this evidence, the jury should have been given the opportunity to consider whether and to what degree the defendants' conduct caused Tong to sustain emotional distress.

CONCLUSION

For all the foregoing reasons, this Court is respectfully requested to grant certiorari in this case.

Respectfully submitted,

DATED: _____

TU MY TONG,
Petitioner in pro se

Filed 6/29/10 Tong v. Rone CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TU MY TONG,	) B210280
	)
Plaintiff and Appellant	)
	)
v.	)
	)
MICHEL RONE, et al.,	)
	)
Defendants and Respondents	)
	)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Reversed and remanded.

Mazur & Mazur, Janice R. Mazur and William E. Mazur, Jr., for Plaintiff and Appellant.

Law Offices of Robert S. Altagen, Robert S. Altagen and Hanwei Cheng for Defendants and Respondents.

Appellant Tu My Tong (Tong) appeals from the superior court's judgment and its postjudgment orders rendered on August 7 and September 30, 2008, including the court's denial of her motions for new trial and for attorney fees. Respondents are U.S. Credit Bancorp, Inc. (USCB), the present holder of the promissory note and deed of trust on the real property at issue, and its officer and sole shareholder, Michel Rone (Rone). Tong contends the trial court erred in (1) granting Rone a motion for judgment on the pleadings; (2) awarding USCB attorney fees incurred in defending its security; (3) charging attorney fees to the indebtedness owed on the note; (4) precluding Tong from recovering emotional distress damages under Civil Code section 2943;[1] (5) ruling Tong's cause of action for violation of Business and Professions Code section 17200 et seq. (UCL) was moot; (6) denying Tong's request for attorney fees as a prevailing party under sections 2943 and 1717; and (7) denying her motion for new trial with respect to an alleged tender offer

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1 All further statutory references are to the Civil Code unless noted otherwise. Present section 2943, subdivision (c)(1) provides in part that "[a] beneficiary, or his or her authorized agent, shall, on the written demand of an entitled person, or his or her authorized agent, prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand." Subdivision (d) provides in part that a payoff demand statement "may be relied upon by the entitled person or his or her authorized agent in accordance with its terms . . . for the purpose of establishing the amount necessary to pay the obligation in full."

prior to litigation.

FACTS

1. Note and Deed of Trust

Duc Doan (Doan) owned an apartment building located on the 4000 block of South Figueroa Street in Los Angeles, California (the property). In August 2000, Doan entered into an adjustable rate note for $312,000 with Southern Pacific Bank that eventually was assigned to Imperial Credit Industries, Inc. (Imperial). As security for the loan, a multifamily deed of trust for the property was recorded with the county recorder's office in September 2000. A number of outstanding payments accrued under the note, and Doan defaulted on his loan.

Between February and April 2003, Doan purported to transfer all of his interest in the property to appellant Tong through a series of deeds: a grant deed in February 2003, a grant deed in March 2003 and a quitclaim deed in April 2003.

2. Attempted Assumption by Tong

After receiving the deeds from Doan, Tong attempted to assume the loan. However, on May 19, 2003, Imperial declared the loan immediately due and payable under the note and deed of trust.[2] Imperial served notice on Doan, informing him that he was in default under the note and deed of trust because of his improper transfer of the property to Tong, because he had defaulted on the loan, and because he had failed to maintain the property resulting in citations by the housing department.[3]

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2 Section 11 of the adjustable rate note provided: "If all or any part of the Property or any interest in it is sold or transferred . . . without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument."

3 Section 7(C), "Notice of Default," of the note provided that if the borrower is in default, "the Note Holder may without any demand or notice: [¶] (1) Declare the entire unpaid principal amount of this Note and all accrued interest and charges to be immediately due and payable; [¶] (2)

On May 29, 2003, Tong entered into an agreement to sell the property to Urban Eco Housing, LLC (Urban Eco), for $575,000. Imperial did not allow Tong to pay off Doan's note, and so the sale was never consummated.

The loan having not been paid, Imperial recorded a notice of default and election to sell the property under the deed of trust on June 20, 2003.

3. USCB's Purchase of Note

In August 2003, USCB purchased the loan from Imperial, making USCB the new lender.[4] Soon afterwards, on August 29, 2003, Imperial gave Tong notice that USCB had purchased the loan and that all future payments should be made to USCB. USCB wrote Tong's attorney advising it had assumed the Imperial loan based on Tong's representation that she owned the property and that she would pay the loan in full on November 30, 2003. USCB stated the amount currently outstanding was $313,900 bearing interest at 11.86 percent and no partial payment would be accepted.

Meanwhile, on June 10, 2003, Doan filed an action against Tong in state court and recorded a lis pendens on the property to prevent foreclosure.

On November 5, 2003, Tong requested a meeting with Rone, saying she intended to pay off the loan in full by November 7, 2003. Receiving no response to her letter, she failed to meet with Rone who was present at the appointed time. Tong claimed she had funds available to pay off the note through an oral understanding with Dennis Hawks, a private lender who was willing to lend her $340,667.39 at 6 percent

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Exercise any rights that we have under any Deed of Trust and Assignment of Rents, Assignment of Deed of Trust, and/or Security Agreement securing this Note or that otherwise are given to us by law . . . ."

4 The parties stipulated that USCB assumed the same rights, benefits and obligations of Imperial on the note and deed of trust.

interest.

4. Doan's Bankruptcy and Adversary Proceedings

In August 2003, Doan filed for bankruptcy. In June 2004, Doan filed an adversary proceeding in the bankruptcy court against Tong, USCB and Rone with respect to the property. In his complaint, Doan claimed that, in exchange for his transferring title in the property to Tong, she had promised to live with him, to obtain a loan and to help him repair the property. He alleged Tong then tried to sell the property for herself and made a deal to sell the property to Urban Eco. Doan alleged that Tong had conspired with Rone and USCB to share profits from the property, of which Doan was the legal owner. Urban Eco then intervened in the adversary proceeding and filed a cross-claim against Tong, USCB and Rone. Urban Eco alleged it was a bona fide purchaser for value of the property and that USCB and Rone had conspired with Tong and had interfered with Urban Eco's contract to purchase the property from Tong.

In July 2004, the bankruptcy court entered an order confirming Doan's chapter 13 plan. Under the plan, Doan agreed to pursue the adversary proceeding against Tong, USCB and Rone and seek recovery of the property.

5. Tong's Requests for Payoff Demand Statement

In early November 2003, Tong, through her then attorney, submitted her first request to USCB for a payoff demand statement pursuant to section 2943. USCB produced a statement indicating the amount due on the note as of November 7, 2003, was $341,791.20 and requested payment in full.

Due to several encumbrances placed on the property, Tong was unable to obtain a lender.[5] However, Hawk was still

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5 It was stipulated that as of January 1, 2005, the following

willing to lend Tong money to pay off the note at 6 percent interest secured by the property if all other loans were subordinated to his lien.[6]

On January 18, 2005, Tong through her then counsel requested another payoff demand statement from USCB. USCB refused to provide the statement without sufficient proof of Tong's status as an entitled person or a beneficiary under the deed of trust. Tong did not provide the requested proof, but, on May 5, 2005, Tong's counsel responded by offering to make "full payment" of the note and deed of trust, which he currently estimated to be $413,000, within three business days of receipt of demand.

USCB wrote Tong's counsel on May 19, 2005, asserting that Tong was not the borrower on the note and "as such she does not have the legal standing to make a payoff demand" absent proof of Tong's entitlement, such as Doan's permission, which he refused to give.[7] However, USCB noted that Tong had recently propounded discovery against USCB in the bankruptcy court, and USCB attached a copy of its response indicating that as of May 5, 2005, the outstanding principal balance of the note was $313,900, the outstanding interest was $75,677.20, the outstanding late charges were $4,490.91 and the attorney fees to date were $32,673.42, for a total of

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encumbrances were recorded against the property: (1) lis pendens by Urban Eco; (2) lis pendens by Doan; (3) deed of trust by Imperial, i.e., USCB; (4) $75,000 lien by Tong Lai; (5) $150,000 lien by Loit Nguyen; (6) $45,000 lien by Chau Lai; (7) $90,000 lien by Bao Lai. It was further stipulated that the same encumbrances remained on the property as of November 2006, except for the Doan lis pendens.

6 Hawk testified at trial he would have been willing to lend Tong up to $641,000.

7 Doan's counsel had threatened to sue USCB for invasion of privacy if it provided details of the note to Tong.

approximately $426,741.53.[8]

USCB's counsel informed Tong's counsel that because Doan was then in chapter 13 bankruptcy proceedings and the source of funds for repayment might constitute post-petition financing or an action outside the ordinary course of business, "before payment will be accepted by my client and credited to its account I request an order of the Bankruptcy Court approving the post-petition payment."

On November 21, 2006, the bankruptcy court entered a final judgment in the adversary proceeding in favor of Tong and against Doan, declaring Tong to be the owner of the property. Tong's counsel provided USCB with a copy of the bankruptcy court judgment on the same day.

USCB then provided Tong with a payoff demand

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8 Section 7(D) of the note, entitled, "Payment of Note Holder's Costs and Expense," provided: "If the Note Holder has required me to pay immediately in full . . . , the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. *Those expenses include, for example, reasonable attorneys' fees.*" (Italics added.)

Section 12(a) of the deed of trust, under the title "Protection of Lender's Security," stated that "[i]f Borrower fails to perform any of its obligations under this Instrument or any other Loan Document, or if any action or proceeding is commenced which purports to affect the Mortgaged Property, Lender's security or Lender's rights under this Instrument, including . . . insolvency, . . . fraudulent conveyance or reorganizations or proceedings involving a bankrupt . . . , then Lender at Lender's option may make such appearances, disburse such sums and take such actions as Lender reasonably deems necessary to perform such obligations of Borrower and to protect Lender's interest, including . . . payment of fees and out of pocket expenses of attorneys, accountants, inspectors and consultants . . . ."

Section 12(b) of the deed of trust further provided: "Any amounts disbursed by Lender . . . *shall be added to, and become part of*, the principal component of the Indebtedness, shall be immediately due and payable and shall bear interest from the date of disbursement until paid at the 'Default Rate', as defined in the Note." (Italics added.)

statement on November 30, 2006. The statement reflected that $688,593.06 was owed on the note at that time. This amount included $153,559.44 in attorney fees incurred to protect the integrity of the note from August 12, 2003, to November 30, 2006.[9]

Tong made no effort to pay the note after receiving the November 30, 2006 payoff demand statement. In February 2007, USCB gave notice of default of its note. However, USCB never foreclosed on the note and Tong remained the owner of the property until the date of trial.

PROCEDURAL HISTORY

1. First Amended Complaint

Tong filed the present action against USCB and Rone on November 24, 2006. In a first amended complaint, Tong alleged USCB failed to timely respond to her January 2005 and November 2006 payoff statement demands. She asserted claims for violation of section 2943, intentional interference with economic advantage, violation of the UCL, declaratory relief and equitable relief. Tong sought punitive damages with respect to her claims for violation of section 2943 and interference with economic advantage. Simultaneously with the filing of the first amended complaint, Tong sought and received a preliminary injunction restraining USCB from foreclosing on

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9 Counsel who defended USCB and Rone in the bankruptcy proceedings testified his total charges, including costs, amounted to $143,726.86, of which USCB had paid $101,000. The charges were incurred for legal representation in obtaining relief from the automatic stay imposed against any action to foreclose on the property, defending USCB's interest as a creditor in Doan's chapter 13 case, defending USCB and Rone against Doan's adversary proceeding and defending USCB and Rone in the cross-claim brought by Urban Eco in the adversary proceeding. Doan's adversary proceeding was settled by a dismissal of USCB and Rone with prejudice in approximately May 2005, and the bankruptcy court dismissed Urban Eco's cross-claim against USCB and Rone without prejudice on June 20, 2007.

the deed of trust executed by Doan.

Tong alleged that USCB and Rone refused to allow her to pay off the loan and prevented her from obtaining new, lower rate financing. Tong claimed the failure to provide the requested payoff demand statement for over two years caused her damages, including approximately $300,000 in late fees, interest, attorney fees charged on the loan, attorney fees incurred by Tong to protect the property and other general and special damages.

The first amended complaint asserted the refusal to provide a timely statement or to permit Tong to pay off the Imperial loan were intended to eventually create such a financial burden on the property that Tong would not be able to pay off the loan allowing USCB and Rone to acquire the property by foreclosure.

*2. **Judgment on Pleadings***

Shortly before trial, USCB and Rone moved for judgment on the pleadings, and the court granted the motion as to Rone alone. The court determined Rone was not a beneficiary of the deed of trust nor an assignee of a beneficiary subject to section 2943, subdivision (c) and therefore had no obligation to comply with section 2943.

*3. **Bifurcated Trial***

The case proceeded to a bifurcated trial.

A. Jury Trial, Nonsuit and Special Verdict

The claims for violation of section 2943 and intentional interference with economic advantage were first tried to a jury. After the close of Tong's case, the trial court granted USCB's motion for nonsuit on Tong's claims for intentional interference with economic advantage and for punitive damages.

The jury found by special verdict that Tong was an "entitled person" within the meaning of section 2943. It found that Tong made a written demand to USCB for a payoff demand

statement on January 18, 2005, and that USCB willfully failed to provide her with a statement within 21 days of the demand as required. The jury determined Tong sustained actual damages of $190,473.66 as a result of that failure.

The jury further found that even though Tong also made a written demand to USCB for a payoff demand statement on November 21, 2006, USCB did not willfully fail to timely provide her a statement.

In a supplemental special verdict, the jury answered "no" to the question whether any portion of the damages it awarded was based on the attorney fees USCB requested in the payoff statement.

B. Court Trial

The trial court then proceeded to hear and determine the remaining equitable issues. The court ruled the UCL cause of action was moot because the remedies under the UCL were "very narrowly defined," and the jury's damage award of $190,473.66 clearly exceeded the actual restitution amount to which Tong would be entitled. The court further limited its inquiry to determining (1) the rights and obligations of the parties under the note, i.e., "what the loan amount is," and (2) whether any claimed attorney fees incurred in defending the note is chargeable to the note.

On May 27, 2008, the court made a tentative ruling. After again ruling the UCL action to be moot, the court found as of April 1, 2008, the amount due on the note as claimed by USCB was $756,473.96. The court subtracted from this figure the jury's damage award of approximately $190,000 and added an amount for reasonable attorney fees USCB incurred in defending the security in Doan's bankruptcy and the adversary proceedings.

No party requested a statement of decision, and the court issued a final ruling. It directed USCB to prepare and

submit a proposed judgment. After hearing objections that Tong filed to the proposed judgment, the court entered a judgment on August 1, 2008. The court denied a belated request for a statement of decision by Tong as untimely.

C. Judgment

The judgment as entered declared that Tong owed USCB the sum of $522,546.85 on the adjustable rate note as of April 1, 2008. The trial court also declared that (1) the amount owed on the note as of August 1, 2008, was $533,266.53, and (2) USCB has the right to not accept partial payments from Tong and to demand full payment on the note.

4. Motion for Attorney Fees and for New Trial

Following the judgment, Tong moved for an award of attorney fees, contending she was the prevailing party in the lawsuit.[10] Tong also moved for a new trial, on grounds that (1) the court's dismissal of the UCL cause of action during trial was an irregularity in the proceedings; (2) the award to USCB of attorney fees incurred in defending the Doan bankruptcy and the Urban Eco action was against the law and without legal justification; (3) the court used an erroneous figure in calculating the amount owing on the note because no objection was raised to Tong's tender offer of $413,000,[11] and (4) the court's use of $756,473.96 as the starting point for its calculations was an irregularity in the proceedings that prevented Tong from having a fair trial.

The court denied both motions.

With respect to the motion for a new trial, the court

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10 Tong sought attorney fees of $267,950 for prosecuting this action against USCB.

11 Tong asserted, for the first time, that USCB had waived the right to claim the "pay-off amount" was anything more than $413,000 because it was undisputed that Tong made a "valid and binding 'statutory' tender offer" that USCB rejected.

stated it found the UCL cause of action to be moot because a plaintiff in a UCL action is generally limited to restitution and injunctive relief, the jury had awarded Tong more damages than she would have been entitled to in a UCL action, and the court retained its equitable power. The court noted Tong had misconstrued the nature of USCB's claim for attorney fees in her declaratory relief claim. USCB's claim concerned whether the attorney fees it incurred in defending the bankruptcy proceedings and the Doan and Urban Eco actions could be added to the indebtedness on the note. The court stated whether Tong made a "tender offer" in good faith and whether she was able and willing to perform were questions of fact that were never presented to the jury, and USCB was never given the opportunity to litigate the issue at trial because Tong never raised it. The court indicated the figure of $756,473.96 was provided as the amount that USCB claimed under the note, including principal, interest, late penalties and fees, as well as attorney fees incurred to defend the security, and the figure was consistent with the evidence. Tong never disputed that figure during trial and her attorney had even adopted the figure during argument before the jury.

With respect to Tong's motion for attorney fees, the court found Tong failed to establish she was a prevailing party on a contract pursuant to section 1717 and she had offered no basis for an award of attorney fees based on her success of her section 2943 cause of action.

5. Consolidated Appeal

Tong filed timely appeals from the judgment and from postjudgment orders. This court consolidated such appeals.[12]

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12 USCB also purported to appeal from the judgment, but we dismissed its appeal as untimely. We previously granted Tong's petition for writ of supersedeas, staying the trial court's order that the injunction preventing a trustee sale shall terminate within 30 days after judgment, and

DISCUSSION

1. Damages for Emotional Distress

Tong asserts that section 2943, which provides that a beneficiary who fails to prepare and deliver a beneficiary statement within the time allowed is "liable to the entitled person for all damages which he or she may sustain by reason of the refusal," entitles her to recover for "actual damages," including emotional distress damages caused by the failure to timely prepare and deliver such statement.[13] Tong offers no case authority for this proposition and concedes the question of whether emotional distress damages are recoverable in an action asserting a violation of section 2943 appears to be one of first impression. We need not address this issue because the trial court properly found evidence of Tong's emotional distress and causation to be insufficient in any case.

Tong did not include any claim for emotional distress in her complaint. The issue of recovery for emotional distress was first raised during trial during a discussion of the special verdict form, when Tong's counsel indicated he intended to argue that she was entitled to emotional distress damages. The following court day, the issue was raised and argued again, and the trial court denied Tong's request to argue emotional distress damages to the jury.

The court indicated the parties had primarily a

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ordered the stay to be in effect until the issuance of a remittitur or further order of this court.

13 Section 2943, subdivision (e)(4) states in part: "If a beneficiary for a period of 21 days after receipt of the written demand willfully fails to prepare and deliver the statement, he or she is liable to the entitled person for all damages which he or she may sustain by reason of the refusal and, whether or not actual damages are sustained, he or she shall forfeit to the entitled person the sum of three hundred dollars ($300)."

contractual relationship, and it construed section 2943 as a "quasi-contractual" cause of action. More importantly, the court indicated USCB had not received proper notice in the complaint that Tong was claiming emotional distress damages. In any case, the court indicated it found no causation and no sufficient evidence to submit emotional distress to the jury.

The court had instructed the reporters to review their notes for anything in Tong's testimony that could possibly be construed as referring to emotional distress. The only passage the reporters identified that could be construed as referring to emotional distress was a statement Tong volunteered during her examination by USCB's counsel.[14] Tong's volunteered statement was never followed up in her testimony, even on redirect examination. There was no medical evidence presented during trial regarding Tong's emotional distress. Nor did Tong provide any evidence of special damages, such as medical expenses or expenses for medication taken for alleged distress.

The record indicates Tong had many serious concerns during this period other than payment of the Imperial note. Among other things, Tong was restoring an apartment building shut down by the city as uninhabitable; a criminal case had been filed against Doan, and the city had warned Tong about

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14 The following exchange occurred during Tong's cross-examination: "[QUESTION:] Before June 2003 you had a Mr. Davis as your lawyer? [¶] ANSWER: Yes, I did have about two weeks before that. [¶] QUESTION: Now, at the time that you were acquiring the property from Mr. Duc Doan, do you have an attorney? [¶] ANSWER: No. [¶] QUESTION: You testified, if my memory is correct, that after you got two-thirds of the property you met Mr. Hawks? [¶] ANSWER: I don't remember. [¶] QUESTION: Do you remember what you said yesterday? [¶] ANSWER: Yesterday, I don't remember. Really, I don't remember five years ago. March or April. I don't remember. Okay. I really -- it's five years. *Many things happen to me very stress and very crisis mental* so I don't remember five years ago." (Italics added.)

her own potential criminal liability unless the building was repaired; Tong needed to find funding to repair the building and was dealing with contractors to rehabilitate the structure; Tong also was involved in litigation both in state court and in bankruptcy court with Doan and Urban Eco;[15] two lis pendens and a number of liens were filed against the property; and Tong was indebted on various other loans, including loans from her relatives.

The trial court therefore did not err in precluding Tong from arguing emotional distress before the jury as a result of the failure to timely provide a payoff demand statement. In light of our holding, we need not address whether emotional distress damages may be recovered as damages under section 2943.

2. UCL Cause of Action

Tong contends the trial court erred in dismissing her UCL cause of action as moot prior to the court trial and in denying her motion for new trial on that basis. Tong argues that she should have been permitted to pursue her UCL remedies, "including the imposition of an injunctive relief against the defendant prohibiting similar conduct in the future," in addition to her claim for "restitution of any and all 'ill-gotten gains' obtained by the defendant by virtue of its wrongful conduct." She asserts such "'ill-gotten gains'" should include all interest earned on the note after February 2005, the date USCB was required to provide a payoff statement, and USCB's attorney fees, which Tong asserts would not have been incurred if she had been allowed to pay off the note in early 2005. She asserts that any interest accruing on the note after that date further constituted "profit to the defendants gained as a result of

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15 Tong testified Urban Eco "cheated" her by failing to pay for the property, "[h]anging me there" by filing a lien on the property, "[c]hop my neck" in filing a lis pendens and "forgery my initial" on the purchase contract.

their unfair business practices." (Underscoring omitted.) In essence, Tong argues she should not pay any interest whatsoever on the loan as a penalty for the alleged unfair practice, nor should she pay any part of the attorney fees USCB incurred in defending its security. We disagree.

The UCL statute seeks to deter future violations and to foreclose retention by the violator of ill-gotten gains. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.) The Legislature intended that the equitable powers of a court be used to prevent practices that constitute unfair competition and to restore to any person in interest "any money or property acquired through unfair practices." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1147-1148 (*Korea Supply*).) However, *Korea Supply* cautions that "[w]hile the 'prevent' prong of [Business and Professions Code] section 17203 suggests that the Legislature considered deterrence of unfair practices to be an important goal, the fact that attorney fees and damages, including punitive damages, are not available under the UCL is clear evidence that deterrence by means of monetary penalties is not the act's sole objective. A court cannot, under the equitable powers of section 17203, award whatever form of monetary relief it believes might deter unfair practices." (*Id.* at p. 1148.) Indeed, the Supreme Court explained, "[o]ur previous cases discussing the UCL indicate our understanding that the Legislature did not intend to authorize courts to order monetary remedies other than restitution in an individual action. This court has never approved of nonrestitutionary disgorgement of profits as a remedy under the UCL." (*Ibid.*)

In this case, the trial court ruled several times that the jury's verdict rendered Tong's cause of action for violation of the UCL moot, first at the conclusion of the jury trial, again before final argument, and lastly in denying the motion for new

trial. The court specifically found that the amount of the jury's damage award exceeded the amount of actual restitution.[16] The first amended complaint included a cause of action for equitable relief, including an injunction against USCB from engaging in unfair and deceptive practice and from foreclosing on the property. Dismissal of the UCL claim did not deprive the court of its equitable power to grant injunctive relief, and the trial court could, and did, enjoin USCB from foreclosing on the property.

In arguing "restitution" should have included such items as attorney fees expended by USCB to defend its security, Tong is seeking to revisit her claim for damages awarded by the jury. But, Tong essentially is seeking to substitute a UCL claim for a tort or breach of contract action. This, she cannot do. (*Korea Supply, supra,* 29 Cal.4th at p. 1151.)

Tong in any case has not shown she was prejudiced by the court's dismissal of the UCL claim. (Code Civ. Proc., § 475; Cal. Const., art. IV, § 13.)

3. Dismissal of Rone

Tong contends the trial court erred when it granted Rone a judgment on the pleadings and dismissed him as a defendant. We disagree.

Subdivision (c)(1) of section 2943 (formerly subdivision (c)) provides that a "beneficiary" of a deed of trust or an authorized agent "shall, on the written demand of an entitled person [defined in § 2943, subd. (a)(4) to include "the trustor or

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16 There is no dispute that the jury verdict damage award of $190,473.66 reflected a reduction in the amount USCB claimed was due on the note as of April 1, 2008, for late fees, penalties and the difference between the 11.86 percent interest rate charged and the 6 percent interest rate Tong would have paid by obtaining a new loan to pay off the note in February 2005. Because USCB rejected Tong's partial payments on the note, there were no funds for USCB to disgorge.

mortgagor of, or his or her successor in interest in, the mortgaged or trust property or any part thereof"] . . . prepare and deliver a payoff demand statement to the person demanding it within 21 days of the receipt of the demand." A "payoff demand statement" is defined as a written statement "setting forth the amounts required as of the date of preparation by the beneficiary, to fully satisfy all obligations secured by the loan that is the subject of the payoff demand statement." (§ 2943, subd. (a)(5).) A beneficiary is defined in section 2943, subdivision (a)(1) as "a mortgagee or beneficiary of a mortgage or deed of trust, or his or her assignees." Thus, section 2943 imposes liability solely upon a "beneficiary" for a willful failure to prepare and deliver a payoff demand statement.

In her first amended complaint, Tong alleged that Rone was at all times the "sole officer" in USCB. She alleged that "Rone through [USCB]" purchased the Imperial loan. Tong's first two causes of action alleged a willful failure to timely provide a payoff demand statement under section 2943 in January 2005 and November 2006. The trial court ruled that Rone had no such duty to provide a payoff demand statement as he was neither the "beneficiary" of the deed of trust nor an "assignee of a beneficiary" subject to section 2943.

The first amended complaint contained boilerplate allegations on information and belief that each defendant was "the agent, servant and employee" of each other. In *Black v. Sullivan* (1975) 48 Cal.App.3d 557 (*Black*), the court held that mere allegations of an agency relationship does not impose any individual liability for failure to comply with demands for beneficiary statements as required by section 2943. (*Id.* at pp. 565-566.)

However, Tong argues that in *Black* the court reversed a summary judgment in favor of the assignees on a conspiracy cause of action finding there were triable issues of fact as to

whether the assignees "'united, participated or cooperated [with the beneficiaries] in inflicting a wrong on [plaintiffs].'" In the present case, the fact that Rone performed the acts alleged, such as in allegedly agreeing to accept monthly payments, improperly added late fees and other such allegations would not establish a "conspiracy," as the corporation could only act through Rone as sole officer of USCB. The first amended complaint alleged that "defendants," i.e., USCB and Rone, took certain acts, but nowhere was it alleged that those acts were done by Rone individually, for Rone personally or that Rone had a direct interest in the transaction.

In her reply brief, Tong asserts that the allegations against Rone go far beyond mere agency, and "move into the realm of alter ego." But the first amended complaint contains no pleading of alter ego nor any allegations establishing there was a "unity of interest and ownership" between USCB and Rone such that (1) the separate personalities of the corporation and the individual no longer exist, and (2) if the alleged acts are treated as those of the corporation alone, an inequitable result will follow. (*Judelson v. American Metal Bearing Co.* (1948) 89 Cal.App.2d 256, 263-264; see 9 Witkin, Summary of Cal. Law (10th ed. 2005) Corporations, § 10, p. 787 ["it is insufficient merely to show a 'one-man' or 'two-man' corporation, or ownership of a subsidiary by the parent"].)

Tong argues that even assuming Rone could not be held personally liable under the causes of action for violation of section 2943, he could still be liable for intentional interference with economic advantage, violation of the UCL and for declaratory and equitable relief.

However, each of these causes of action is premised upon the beneficiary's failure to provide the payoff demand statement, which Rone had no individual obligation to provide. In the claim for intentional interference with economic

advantage, for example, Tong alleged that defendants "knew, or should have known that their failure to provide a payoff statement and to allow payoff of the Imperial Loan would prevent plaintiff from refinancing the Imperial Loan at a more advantageous rate."

The trial court therefore properly granted a judgment on the pleadings to Rone.

4. Tender Offer

Tong contends the trial court erred in using the payoff amount of $756,473.96, the sum USCB claimed, instead of $413,000, the amount contained in a tender offer she allegedly made on May 5, 2005, pursuant to Code of Civil Procedure section 2074.[17] Tong contends the court erred in denying her motion for new trial on that basis. Tong asserts the fact that the evidence of her tender and USCB's rejection of the tender were "undisputed" at trial and therefore the issue was not raised for the first time in the motion for new trial. We disagree.

We review the trial court's determination of a motion for new trial for abuse of discretion. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859; *ABF Capital Corp. v. Berglass* (2005) 130 Cal.App.4th 825, 832.) An abuse of discretion occurs when, in light of applicable law and considering all relevant circumstances, the court's ruling exceeds the bounds of reason and results in a miscarriage of justice. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) We conclude the trial court did not abuse its discretion in denying a new trial.

The record shows that prior to the new trial motion Tong never contended the payoff amount was limited to the

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17 Code of Civil Procedure section 2074 provides that "[a]n offer in writing to pay a particular sum of money . . . is, if not accepted, equivalent to the actual production and tender of the money . . . ."

$413,000 amount in the tender offer. Tong submitted the case to the jury on the premise that certain amounts should be *subtracted from* the approximately $750,000 figure. Under the doctrine of the theory of trial, a party is not permitted to change a theory on appeal that she has pursued in the trial court. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 407, pp. 466-468.) Thus, it is said that "[a] party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) A typical application of this rule occurs is when one theory of damages was acquiesced in at the trial and the appellant seeks to shift to another theory of damages on appeal. (*Kantlehner v. Bisceglia* (1951) 102 Cal.App.2d 1, 6 ["Counsel may not so conduct themselves in the trial of a case as to lead the jury to proceed upon one theory and then seek to abandon that theory upon appeal and adopt another one"].)

Considerations of fairness to the parties and the trial court and preventing gamesmanship by the litigants militate against allowing Tong to argue one measure of recovery during trial and a different measure on appeal.

5. Attorney Fees in Defense of Security

Tong contends that the trial court erred when it found that attorney fees incurred by USCB in the third party actions were chargeable to the note. She argues that the jury found USCB had willfully violated section 2943 by failing to provide her with a payoff demand statement when requested in January 2005 and awarded damages of over $190,000. In the court trial that followed regarding a determination of the amount due on the note, the court found USCB was entitled to charge, in addition to principal and interest due, about $113,000 of the more than $150,000 in attorney fees it had incurred in

defending the bankruptcy proceedings and the Doan and Urban Eco actions. Tong asserts the court erred as a matter of law in charging these fees to the note. We disagree.

When attorney fees are contractually provided for in a deed of trust and promissory note, the beneficiary is entitled to recover attorney fees and costs incurred to enforce and protect its secured obligation. (*Wutzke v. Bill Reid Painting Service, Inc.* (1984) 151 Cal.App.3d 36, 46; see also *Nevin v. Salk* (1975) 45 Cal.App.3d 331, 340.) This is true whether or not the trustor is a party to the action. (*Nevin, supra*, at p. 339.) What constitutes a reasonable compensation is in the court's discretion and is based upon: the nature of the litigation; its difficulty and the amount involved; the skill required and the skill employed in handling the litigation; the attention given; the success of the attorney's efforts; the attorney's learning, his or her age, and his or her experience in the particular type of work demanded; the intricacies and importance of the litigation; the labor and necessity for skilled legal training and ability in trying the cause; and the time consumed. (*Id.* at p. 343.)

The trial court properly charged USCB's attorney fees incurred in defending the Doan and Urban Eco adversary proceedings to the amount owed on the note. In the present case, both the note and deed of trust specifically entitle USCB to recover attorney fees.

In particular, section 7(D) of the note provides that if the note holder has required the debtor to pay "immediately [and] in full," the note holder will "have the right to be paid back by me [i.e., the debtor] for all of its costs and expenses in enforcing" the note. Such expenses "include, for example, reasonable attorneys' fees." Section 12(a) of the deed of trust provides that if the borrower fails to perform any of his obligations under the note and deed of trust or "if any action or proceeding is commenced which purports to affect the

Mortgaged Property, Lender's security or Lender's rights under this Instrument, including . . . insolvency, . . . fraudulent conveyance or reorganizations or proceedings involving a bankrupt," then the lender at its option is granted the authority to make appearances, disburse sums and take actions it "reasonably deems necessary to perform such obligations" and "to protect [its] interest," including paying fees and out-of-pocket expenses of attorneys. Finally, section 12(b) of the deed of trust provides that any amounts disbursed "shall be added to, and become part of, the principal."

After the property transfer, Doan immediately sued Tong in state court, filed for bankruptcy, placed a lis pendens on the property, and sued both Tong and USCB in the bankruptcy court for recovery of the property and declaratory relief. Doan alleged Tong defrauded him and charged USCB with conspiracy to share the expenses and profits of the property with Tong as co-owners and, significantly, sought a turnover of the property to the bankruptcy estate. The bankruptcy and bankruptcy adversary proceedings purported to affect the "[m]ortgaged [p]roperty," the "[l]ender's security" or the "[l]ender's rights" under the deed of trust and also included claims of "insolvency," "fraudulent conveyance or reorganization[] or proceedings involving a bankrupt" within the meaning of section 12 of the deed of trust.

The trial court found USCB properly appeared in those actions or proceedings and that it disbursed funds to protect its lender's interest. The broad language of the deed of trust encompassed USCB's actions in seeking relief from the bankruptcy court, in objecting to Doan's chapter 13 plan, in defending against Doan's action and ultimately in achieving its dismissal, all of which were clearly related to the defense and protection of the collateral. The court found that USCB's defense of the Urban Eco action too was reasonably undertaken

because Urban Eco had a lis pendens on the property and sought a permanent injunction against USCB from foreclosing on the property. In opposing Urban Eco's claim, USCB logically acted to protect its collateral. The court did not abuse its discretion in scrutinizing counsel's bills and costs and determining approximately $113,000 was a reasonable disbursement to preserve the security.

Although a nonassuming debtor such as Tong is not personally liable for paying reasonable attorney fees incurred by a beneficiary such as USCB to protect its equity in property, such fees may be added to the *indebtedness* secured by the deed of trust. (*Saucedo v. Mercury Sav. & Loan Assn.* (1980) 111 Cal.App.3d 309, 315; see generally 4 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 10.191, p. 597.)

The trial court properly charged USCB's attorney fees incurred in the Doan and Urban Eco adversary proceedings to the amount owed on the note.

6. Tong's Motion for Attorney Fees

Tong contends that the trial court erred in denying her motion for attorney fees because (1) she is the prevailing party with a "net monetary recovery" under Code of Civil Procedure section 1032, subdivision (a)(4); (2) attorney fees are an element of costs when authorized by contract, statute or law, and Tong qualifies under all three categories as a matter of right; and (3) her claimed attorney fees are reasonable. We disagree with the first two contentions and need not address the third.

California follows the American Rule, which is that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ." (Code Civ. Proc., § 1021.) Absent statutory authority or contractual agreement, attorney fees are not

recoverable from an opposing party. (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 485.)

Tong argues that the trial court abused its discretion in refusing to find her to be the prevailing party entitled to attorney fees as costs. (*Hsu v. Abbara* (1995) 9 Cal.4th 863, 877 (*Hsu*).) She states the basis of her lawsuit was the defendants' refusal to allow her to pay the balance due on the note, and the critical question was the amount of money due on the note. Tong asserts that because the jury awarded her damages of about $190,000, which amount the court later deducted from USCB's figure, she plainly achieved a net monetary "gain" or "savings" and the defendants incurred a net loss. And, even if the court added attorney fees of about $113,000 to the balance, she still obtained a net gain of about $75,000, making her the "prevailing party" under Code of Civil Procedure section 1032, subdivision (a)(4).

Whether a party to litigation is entitled to recover costs is governed by Code of Civil Procedure section 1032, which provides, in subdivision (b), that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." For such purposes, Code of Civil Procedure section 1032, subdivision (a)(4) defines "prevailing party" as including, among others, "the party with a net monetary recovery" and "a defendant as against those plaintiffs who do not recover any relief against that defendant." However, "[w]hen any party recovers other than monetary relief . . . , the 'prevailing party' shall be as determined by the court, and under those circumstances, the court, in its discretion, may allow costs or not . . . ." (Code Civ. Proc., § 1032, subd. (a)(4).)

In the present case, Rone clearly was a defendant as against whom the plaintiff did not recover any relief, and Tong could not seek costs from him.

As we explain below, Tong recovers an amount of $190,473.66 and USCB would be entitled to recover the amount owing on the note secured by the deed of trust on the property. This still does not mean that Tong is the prevailing party. The court retains discretion to make the determination as to a prevailing party under Code of Civil Procedure section 1032.[18] (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1338, fn. 4 (*Goodman*).)

Code of Civil Procedure section 1033.5 provides, in subdivision (a)(10), that attorney fees are "allowable as costs under Section 1032" when they are "authorized by" either "Contract," "Statute," or "Law." A party seeking attorney fees must show, independent of the costs statutes, that she is entitled to attorney fees under an agreement, statute, or other law. (*Santisas, supra*, 17 Cal.4th at p. 606.) The trial court determined that Tong was not the "prevailing party," and we find no abuse of discretion in its so finding. Civil Code section 1717 provides that "[i]n any action on a contract," when the contract specifically provides that attorney fees and costs incurred to enforce the contract shall be awarded either to "one of the parties or to the prevailing party," the party whom the

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18 Tong asserts she is entitled to attorney fees as a "prevailing party" on USCB's cross-complaint that was voluntarily dismissed during trial. When a cross-complaint is voluntarily dismissed, ordinarily a cross-defendant is entitled to costs as a matter of right under Code of Civil Procedure section 1032, subdivision (b). (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 (*Santisas*); *City of Long Beach v. Stevedoring Services of America* (2007) 157 Cal.App.4th 672, 679.) The voluntary dismissal of USCB's cross-complaint against Tong does not make Tong the "prevailing party." The dismissal did not remove Tong as a party to the case, and the allegations of the cross-complaint, for "rent-skimming," appointment of a receiver, specific performance and injunctive relief, concerned substantially identical issues being litigated in the complaint. Such dismissal did not mandate that Tong be declared the "prevailing" party. (See *Plemon v. Nelson* (1983) 148 Cal.App.3d 720, 725.)

court determines is the prevailing party shall be entitled to reasonable attorney fees in addition to other costs whether he or she is the party specified in the contract.

Tong did not bring an "action on a contract." Her causes of action were for claimed violations of section 2943, intentional interference with economic advantage, violation of the UCL and declaratory and equitable relief. As the trial court noted, Tong tried her case on the theory she never assumed the note, which contained the only provision allowing for recovery of attorney fees. The note stated that the note holder "will have the right to be paid back . . . for all of its costs and expenses in enforcing this Note," such "expenses [to] include, for example, reasonable attorneys' fees." Because Tong never assumed the note, there was no mutuality of obligation with respect to the contractual provision for award of attorney fees under section 1717. Tong chose to bring her claim on a theory of statutory violation, not breach of contract. An action alleging a violation of statutory duty sounds in tort rather than contract. (See *Pintor v. Ong* (1989) 211 Cal.App.3d 837, 842 ["Where the identical act constitutes both a tort and a breach of contract, the injured plaintiff ordinarily can choose which action to pursue"]; 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 144, pp. 221-222.) The trial court found that even if Tong's claim were considered an action for breach of contract she was not the prevailing party, as Tong had two objectives, to recover for USCB's failure to provide the payoff demand statement and to exclude all attorney fees from being charged to the principal, and she succeeded in only the lesser objective.

Aside from declaratory relief, the only cause of action on which Tong prevailed was for a single violation of section 2943. Section 2943 makes no provision for the recovery of attorney fees. Had the Legislature intended under section 2943 to allow attorney fees to be included as "all damages," it would

have specifically stated such. The Legislature knows how to provide for attorney fees when it intends such to be included as "damages." For example, in section 2941, subdivision (b)(6), which appears in the same chapter as section 2943, the Legislature has provided: "In addition to any other remedy provided by law, a title insurance company preparing or recording the release of the obligation shall be liable to any party for *damages, including attorney's fees*, which any person may sustain . . . ." (Italics added.) In contrast, section 2943, subdivision (e)(4) only provides that a beneficiary who willfully fails to timely prepare and deliver the payoff demand statement "is liable to the entitled person for *all damages* which he or she may sustain . . . ." (Italics added.) The statute therefore does not authorize the award of attorney fees as Tong claims.

As to the declaratory relief claim, both sides asserted they prevailed. The trial court found that although the attorney fees to be included in the principal sum owing on the note were reduced, defendant still was the prevailing party on the declaratory relief claim. When the results are mixed, the court retains discretion to award attorney fees, and we find no abuse under these circumstances. (*Hsu*, *supra*, 9 Cal.4th at pp. 876-877.)

Tong's reliance on *Brandt v. Superior Court* (1985) 37 Cal.3d 813 and *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870 is misplaced. In both cases, attorney fees were part of the economic loss proximately caused by an insurer's breach of the implied covenant of good faith and fair dealing and the tortious withholding of benefits to its insured. (*Brandt, supra*, at p. 819; *White, supra*, at p. 889.) Such is not the case here.

7. Form of Judgment

We note, however, that the trial court's judgment cannot be reconciled with the evidence at trial. The present judgment

ignores the central fact that Tong had no contractual or equitable relationship with USCB.

The trial below was bifurcated. In the first phase, the jury found Tong was an "entitled person" under section 2943. The jury also found USCB willfully failed to provide Tong with a payoff demand statement in January 2005. For USCB's violation of section 2943, the jury awarded Tong $190,473.66 in actual damages. In the second phase of the trial, the court tried the equitable issues. The court found $756,473.96 was due on the note as of April 1, 2008, an amount that included USCB's attorney fees incurred in the bankruptcy court. From the $756,473.96 due, the court (1) subtracted Tong's $190,473.66 in actual damages; (2) subtracted USCB's demand of $157,180.31 in attorney fees for the Doan and Urban Eco proceedings embedded in the amount due on the note and, (3) added $113,726.86 in attorney fees from the Doan and Urban Eco proceedings that the court deemed chargeable to the note. Summing its subtractions and additions, the court purports to state in the judgment that Tong "owes" USCB $522,546.85 as of April 1, 2008, an amount the court's judgment increased to $533,266.53 as of August 1, 2008.

In section 7(D) of Doan's promissory note, Doan agrees to pay the note holder's costs for enforcing the note. Such a provision is reasonably read as a promise by the debtor, or anyone who assumes the debt, to pay the costs that USCB, as the note's holder, incurs in enforcing the note against the debtor or anyone who assumes the debt. However, Tong was not a party to the loan or deed of trust and Tong has not assumed the debt. The existing judgment offsets the amount UCSB owes to Tong by reason of the jury's verdict against the amount the trial court found owing on the promissory note and deed of trust. It was error for the trial court to offset Tong's recovery against the amounts due under the note and deed of trust. The

judgment should have made a separate award to Tong of the $190,473.66 in actual damages awarded by the jury.

Although Tong is not personally liable to pay the sums the trial court found owing under the promissory note and deed of trust, in granting declaratory relief the trial court found USCB entitled to payment of the note, as augmented by attorney fees, in default of which the trustee of the trust deed may proceed with foreclosure. It may well be that Tong as grantee would have to pay off the USCB note, as augmented by attorney fees, to retain the property. But the judgment should have separately set forth the sums owing to USCB on the note and deed of trust, i.e., $756,473.96 due on the note as of April 1, 2008, less $157,180.31, plus $113,726.86 or the sum of $713,020.51 plus appropriate interest.

DISPOSITION

Because we find no error in the jury's verdict on the claim for violation of section 2943 or in the trial court's findings and determination for declaratory relief (except for the form of the judgment), the judgment is reversed and remanded for the limited purpose of permitting the trial court to separately and independently set forth (1) the damages award to Tong against USCB on the section 2943 claim; and (2) the amounts due and payable under the note and deed of trust. The parties are to bear their own costs on appeal.

FLIER, J.

We concur:

BIGELOW, P. J.

RUBIN, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 8

July 21, 2010

Janice R. Mazur
Mazur & Mazur
13465 Camino Canada
#106-103
El Cajon, CA 92021

TU MY TONG,
Plaintiff and Appellant,
v.
MICHEL RONE,
Defendant and Respondent;
S.C.L.A. et al.,
Respondents

B21020
Los Angeles County No. BC357508

THE COURT:

Petition for Rehearing is denied.

cc: All Counsel
File

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 8

Date: July 27, 2010

Janice R. Mazur
Mazur & Mazur
13465 Camino Canada
#106-103
El Cajon, CA 92021

TU MY TONG,
Plaintiff and Appellant,
v.
MICHEL RONE,
Defendant and Respondent;
S.C.L.A. et al.,
Respondents

B21020
Los Angeles County No. BC357508

THE COURT:

Appellant's request for reconsideration filed July 26, 2010, is denied.

cc: File

Court of Appeal, Second Appellate District, Division Eight-No. B210280

S18526

IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
Sep 15 2010

Frederick K. Ohlrich Clerk

DEPUTY

En Banc

TU MY TONG, Plaintiff and Appellant

v.

MICHAEL RONE et al., Defendants and Respondents.
Defendants and Respondents.

The petition for review is denied.

GEORGE
Chief Justice